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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES K. ELDER,
Petitioner,

v.

R. D. HOLLOWAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Bar Association ("ABA") hereby respectfully moves for leave to file the attached brief as amicus curiae in this case. Counsel for petitioner has consented to the filing of this brief, but counsel for respondents has declined to consent.

The ABA is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. The question presented in this case is whether an appellate court reviewing the

dismissal of a civil rights claim on qualified immunity grounds is limited to considering the case authority that the plaintiff cited to the district court. This question raises issues relating to the fair administration of justice and to the role played by the legal profession in our judicial system. These issues implicate core concerns of the ABA, and its perspective on them should assist this Court's deliberations because of the ABA membership's considerable experience with the judicial process.

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BRIEF FOR THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The American Bar Association ("ABA") is a voluntary membership organization of the legal profession dedicated to the promotion of a fair and effective system for the administration of justice. *See* ABA Const., art. 1, § 1.2. The issue presented in this case directly addresses the role that the legal profession plays in the administration of justice. Specifically, this case concerns the consequences that attach to a civil rights plaintiff's failure to

cite relevant case authority to a district court that is considering whether state officials have violated the plaintiff's clearly established constitutional rights.

Because citations of authority are ordinarily the responsibility of counsel, the case ultimately addresses whether counsel's omissions in this situation must cause an individual to forfeit important rights. The interplay between a lawyer's ethical obligations pertaining to citation of authority and vigorous representation of his or her client also bears on the issue presented. These matters are of great interest to the legal profession, and the ABA's perspective on them should be of assistance to the Court.

Moreover, apart from its particular impact on lawyers, the decision below has significant ramifications for the fair administration of justice in section 1983 actions. It therefore implicates core concerns of the ABA, which is well qualified to address the relevant issues because of its membership's considerable experience with the judicial process.[1]

SUMMARY OF ARGUMENT

The Ninth Circuit has adopted an unprecedented rule that will markedly interfere with the fair administration of justice in civil rights damages actions. By requiring an appellate court to rely on legal citations in a party's brief, the court has upset one of the fundamental tenets of our legal system—namely, that it is the province of the court to determine the law. As a practical matter, this rule distorts the judicial process in a way that will increase the occurrence of legally incorrect outcomes and yield an

[1] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Administration Division Council has participated in the adoption of or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Administration Division Council prior to filing.

unwarranted number of disparate results for similarly situated parties. The ultimate consequence will be to undermine both the fairness of the judicial system and the objective standard that this Court has promulgated for resolving qualified immunity claims.

In erroneously shifting responsibility for stating the applicable law from the court to counsel, the Ninth Circuit also places counsel in an unnecessarily difficult position. To a large extent, lawyers unavoidably hold the fate of their clients in their hands—by bearing the burden of making strategic decisions and organizing factual presentations that play a critical role in the outcome of the case. As a practical matter, a lawyer's legal research and argument also play an important role, but they are not dispositive because the court is responsible for discerning the correct legal principles and applying them to the client's case regardless of the lawyer's presentation. Under the Ninth Circuit's new rule, however, a client's case can be irretrievably lost simply because the lawyer fails to cite a relevant precedent in the brief—even when the acknowledged expert in the law, the appellate court, is convinced that the governing legal principles warrant a judgment in the client's favor.

There is no justification in policy or governing precedent for injecting these consequences into the civil justice system. Accordingly, this Court should firmly reject the Ninth Circuit's special rule restricting appellate courts to the universe of legal precedent cited by the plaintiff when they review dismissals of civil rights claims on qualified immunity grounds.

ARGUMENT

APPELLATE COURTS SHOULD DECIDE APPEALS FROM DISMISSALS OF SECTION 1983 ACTIONS ON QUALIFIED IMMUNITY GROUNDS WITH REFERENCE TO ALL APPLICABLE LEGAL PRECEDENTS, NOT JUST THOSE CITED BY THE PLAINTIFF TO THE DISTRICT COURT

A. The Ninth Circuit's Rule Contravenes Fundamental Tenets of Our Judicial System

1. *It is the Responsibility of the Court to Determine the Applicable Law*

The basic role of the judiciary has been settled since the early days of the Republic: "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Although made in the context of comparing the roles of the judicial and legislative branches, this statement also reflects an affirmative declaration of the role of judges in our system of government. The Founders were well aware that the judge's responsibility to determine and apply the law would be a difficult task, noting that judges will require "long and laborious study to acquire a competent knowledge of" the mass of legal precedent. *The Federalist No. 78*, at 529 (Hamilton) (J. Cooke ed., 1961). "Hence it is that there can be but few men in the society, who will have sufficient skill in the laws to qualify them for the stations of judges." *Id.*

In the current federal judicial system, the difficulty of discerning the law has led to a "hierarchy" in which litigants have the right to present their case to an appellate court that is presumed to be more expert in the law than the lower court. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). As Judge Kozinski pointed out in his dissent from denial of rehearing en banc (Pet. App. B at 582, 984 F.2d at 993), the courts of appeals are able to focus their attention on legal issues and thus to develop an

expertise that justifies their power to correct and overturn the trial court's conclusions of law.

To be sure, the judiciary does not perform this function unaided. In their role as advocates, lawyers provide the court with legal precedents to seek to persuade the court to rule for their clients. But lawyers also act as officers of the court in citing legal precedent and therefore are ethically bound to call the court's attention to even "directly adverse" precedent that is unknown to opposing counsel. Model Rules of Professional Conduct Rule 3.3(a)(3) (1992); *see also* Model Code of Professional Responsibility DR 7-106(B)(1) (1980).[2] The reason for this obligation is that "legal argument is a discussion seeking to determine the legal premises properly applicable to the case" (Model Rules of Professional Conduct, Rule 3.3 cmt. (1992))—a determination that ultimately remains the responsibility of the court.

The Code of Judicial Conduct (adopted by the ABA in 1972) confirms that the court is responsible for ascertaining the applicable legal principles, regardless of the parties' submissions. Canon 3A(4) suggests that, if necessary, a judge should seek "the advice of a disinterested expert on the law," and the comment recommends that the judge obtain this advice by inviting the expert to submit an amicus brief. Indeed, the ABA's Special Committee on Standards of Judicial Conduct felt so strongly about the need for a judge to exert every effort to find the law that the Reporter's Notes on the Code authorize a judge to obtain advice from legal experts even by telephone call. E. Wayne Thode, *Reporter's Notes to Code of Judicial Conduct* 54 (1973) (comment on Canon 3A(4)).

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[2] The yardstick for measuring this obligation is whether "the decision which opposing counsel has overlooked [is] one which the court should clearly consider in deciding the case." Model Code of Professional Responsibility DR 7-106(B)(1) note 80 (1980) (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 280 (1949)).

The Ninth Circuit's decision is at odds with this fundamental tradition of judicial responsibility. The court's rule *forces* the appellate court to abdicate its core judicial role. The appellate court is ordered *not* to search for legal precedent that would support the plaintiff's case. If the appellate court is aware of a legal precedent that the plaintiff has overlooked, the court is instructed to ignore that precedent. Instead, it must affirm an outcome that it knows is not in accordance with the governing legal principles. The Ninth Circuit's rule thus is antithetical to the primary function of an appellate court—namely, "to modify, reverse or remand decisions not in accordance with law." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

2. *The Decision Below Confuses the Distinction Between Fact and Law*

The Ninth Circuit attempted to justify its departure from the norms of settled jurisprudence by describing the qualified immunity question as one involving "legal facts." As Judge Kozinski cogently explained in his dissent, this inventive phraseology cannot obscure the fact that the court of appeals has promulgated a new, and unsupportable, legal doctrine.

In our system of adjudication, there exist significant differences in the treatment of factual and legal issues. Facts are case-specific and must be demonstrated through the presentation of evidence. Law, by contrast, is external to any particular case, and disputes over the law do not entail the need for assessing the demeanor of witnesses or other functions that can be performed only by the trial court. For these and other reasons, appellate review of factual determinations is very limited, but appellate review of legal issues is de novo. *See generally* Pet. App. B at 582, 984 F.2d at 993 (Kozinski, J., dissenting).

Even the ethical obligations of lawyers reflect this fundamental distinction. As noted above, lawyers are obligated to assist the court in its determination of the

law by advising it of controlling precedent, even if that precedent is adverse to the lawyer's client. By contrast, lawyers have no such obligation to introduce evidence or otherwise apprise the court of a fact that would advance their adversary's position; indeed, to do so might well violate the ethical obligation of diligent representation. *See* Model Rules of Professional Conduct Rule 1.3 (1992); Model Code of Professional Responsibility DR 7-101(A)(3) (1980) (a lawyer may not "[p]rejudice or damage his client during the course of the professional relationship" except in the case of fraud).

The line between the two categories of fact and law is not always easy to draw, but that provides no basis for eliminating the distinction entirely as the Ninth Circuit has done. Essentially, the Ninth Circuit's rule treats a legal question as one of fact—by placing the responsibility to produce "evidence" (in the form of legal precedent) exclusively upon the plaintiff. That approach is jurisprudentially unsound.

There is no serious dispute that the aspect of qualified immunity involved here—determining what constitutional rights were clearly established at the time of the defendants' actions—is a question of law. This Court consistently has indicated that the qualified immunity inquiry is conducted solely by examining case law, describing it as an "essentially legal question." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Where legal precedent does not clearly establish the conduct in question as unlawful, the challenge to qualified immunity should be rejected "[a]s a matter of law." *Procunier v. Navarette*, 434 U.S. 555, 565 (1978). Indeed, the Ninth Circuit acknowledged below that the issue "presents a 'pure question[] of law.'" Br. in Opp. Exh. A at 6, 975 F.2d at 1392 (quoting *Romero v. Kitsap County*, 931 F.2d 624, 627-28 (9th Cir. 1991)). The court conceded that, accordingly, "our review is de novo." Br. in Opp Exh. A at 8, 975 F.2d at 1392.

The court of appeals sought to justify its decision to treat the qualified immunity question as one of "legal fact[]" by observing that the question is not "what the law *is*, but instead the question is whether the law with respect to a fact-specific set of circumstances *was* . . . 'clearly established.'" Br. in Opp. Exh. A at 11, 975 F.2d at 1394 (emphasis in original). But this observation provides no basis for shifting to the plaintiff the appellate court's traditional responsibility as the ultimate arbiter of the law. Contrary to the Ninth Circuit's assertion (*id.*), the qualified immunity issue is not dramatically different from other kinds of legal issues that courts frequently are asked to decide.

There is certainly nothing unusual about a court deciding what the state of the law *was* at some particular point in the past. For example, tax liability is based on the law in existence at the time the liability arose, and therefore courts reviewing tax cases almost invariably must disregard the current state of the law and instead determine what the law was many years earlier. By the same token, this Court has held that habeas corpus petitions should be judged according to the constitutional standard in effect at the time; a "new rule" does not provide a ground for issuing a writ of habeas corpus. *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989); *Teague v. Lane*, 489 U.S. 288, 306 (1989).

Nor is it unique to the section 1983 context that the legal issue entails a judgment as to how firmly established is the state of the law. This Court has stated that the "'new rule' principle" announced in *Teague* "validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler v. McKellar*, 494 U.S. 407, 414 (1990). Exclusionary rule jurisprudence entails an inquiry into the objective reasonableness of an officer's conduct similar to that involved here. A Fourth Amendment violation does not require suppression of the seized evidence if the officer conducting the

search relied in "objective good faith" on a search warrant—a determination that rests on whether it should have been clear to the officer under existing law that the search was unconstitutional. *United States v. Leon*, 468 U.S. 897, 923 (1984). Indeed, this Court remarked in *Leon* that the objective good faith inquiry is somewhat "analogous" to the qualified immunity inquiry that arises in *Bivens* or section 1983 actions. *Id.* at 922 n.23.

Antitrust law contains another close analogy to the section 1983 inquiry. The "*Noerr-Pennington* doctrine" immunizes from antitrust liability legitimate efforts (including litigation) to influence governmental action, but the protection does not extend to "sham" activities. The test of legitimacy is whether the defendant made "an objectively reasonable effort to litigate." *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 113 S. Ct. 1920, 1926 (1993). As this Court's analysis in that case demonstrates, the nature of the inquiry into "objective reasonableness" is similar to the "clearly established" inquiry in section 1983 actions. This Court examined court of appeals and district court decisions in various circuits at the time the litigation in question was commenced, as well as the contemporaneous view of leading commentators, and it concluded that the law was sufficiently "unsettled" that the litigation could not be considered a sham. *See id.* at 1930. This Court also made plain that this aspect of the inquiry into the sham exception is one that should be decided by the court "as a matter of law," presumably without being restricted to the legal precedent cited by the parties. *Id.*

Thus, the qualified immunity inquiry in section 1983 cases is not unique. Yet in none of the other contexts in which courts are asked to determine the state of the law at some particular time is the appellate court supposed to treat a legal issue as one of fact, with the scope of its review confined to the legal precedent presented by the parties below. There simply is nothing about the nature

of the legal inquiry in section 1983 cases that justifies a special rule prohibiting the appellate court from looking at relevant case law. On the contrary, resolving this sort of inquiry is precisely the sort of duty "that appellate courts are expected to perform" because of their " 'special expertise and experience . . . in assessing the relative force of competing interpretations and applications of legal norms.' " *Pierce v. Underwood*, 487 U.S. 552, 584 (1988) (White, J., concurring in part and dissenting in part) (discussing review of district court award of attorneys' fees on the ground that the government's position was not "substantially justified") (quoting *Spencer v. NLRB*, 712 F.2d 539, 563 (D.C. Cir. 1983), *cert. denied*, 466 U.S. 936 (1984)).

B. The Ninth Circuit's Rule Undermines the Fair Administration of Section 1983 Cases

The Ninth Circuit's holding requiring appellate courts to abdicate ultimate authority to determine the law also threatens to inject practical difficulties into the administration of section 1983 litigation. More significantly, the rule will lead to anomalous and arbitrary results that will undermine the fairness of such litigation.

An important goal of our justice system is to " 'treat[] similarly situated [parties] the same.' " *Harper v. Virginia Dep't of Taxation*, 61 U.S.L.W. 4664, 4666 (U.S. June 18, 1993) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987)). The decision below tramples on that principle. It forces the court of appeals to treat differently two parties who present the same claim for relief on indistinguishable facts, simply because one party cited a particular legal precedent in its papers below and the other party failed to do so.

The Ninth Circuit's rule not only yields inconsistent results; it also yields demonstrably incorrect results. Indeed, by definition, the only time the rule will affect the outcome of a case will be when it causes the appellate

court to reach a result that is contrary to law by ignoring a precedent not cited by the plaintiff. It is one thing for a court to reach the wrong result *unwittingly* because a lawyer's research is faulty and the court does not discover the correct law on its own. That is an unfortunate outcome, but an essentially unavoidable consequence of human frailty. It is quite another matter for a court familiar with the governing law to reach the wrong result *knowingly*, just because the lawyer's research in the district court is faulty. Our justice system should not countenance a doctrine that, with no compelling justification, requires a court deliberately to refuse to do justice to the parties before it.

The Ninth Circuit stated that its restriction on the judicial use of precedent would be limited to appellate courts, but the district court would remain free to rely upon precedents not cited by the plaintiff. Br. in Opp. Exh. A at 15-16, 975 F.2d at 1396. But this power of the district court to supplement the plaintiff's authority throws another "wild card" into the mix that can yield different outcomes for similarly situated plaintiffs, depending upon the fortuity of which trial judge is assigned to the case. Two different trial courts could engage in different independent legal analyses that yield disparate outcomes on indistinguishable facts, yet the appellate court would be powerless to harmonize those outcomes.

Another difficulty with the decision below stems from a question that it leaves unanswered—whether the limitation on appellate review extends to precedents that support the defendant's legal position. The result is unsatisfactory no matter how this question is answered. If the limitation does extend to cases that support the qualified immunity claim, the rule raises the specter of public officials being held individually liable for damages in circumstances where the appellate court is aware that they should be immune under a correct reading of the

law. If the limitation is not so extended, the Ninth Circuit's rule is unreasonably skewed against civil rights plaintiffs.[3]

Finally, the Ninth Circuit's rule unnecessarily places additional pressure on defense lawyers in section 1983 cases. As Judge Kozinski noted in his dissent, the decision below, coupled with the lawyer's ethical obligation to disclose adverse precedent, places counsel in an extremely uncomfortable position with respect to the client relationship. *See* Pet. App. B at 593-94; 984 F.2d at 998-99. Ordinarily, where the appellate court is free to consider all legal precedents, the lawyer's disclosure should not be expected to change the ultimate outcome of the litigation. In this context, however, compliance with the rules of ethics by the defendant's lawyer can transform the case from certain victory for the defense (because the plaintiff would have failed to carry the burden of proving "legal facts") to certain defeat if the precedent is sufficiently on point.

More generally, the fact that a client's legitimate claim can fail because of the lawyer's omission of one citation greatly adds to the pressure that a lawyer inevitably faces when he or she is responsible for a client's case. There is no reason why a lawyer in a section 1983 case should not have this pressure diffused, as it would be in any other kind of case, by the prospect that the appellate court will correctly apply the law even if the lawyer's brief is missing a citation.

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[3] The rule also opens the door to a new set of issues for litigation that could plague the administration of section 1983 cases—namely, how clearly does the plaintiff have to rely upon a case before the court of appeals can consider it. Is it enough for the plaintiff merely to cite the case in the brief? What if the case is mentioned only as part of a string citation? What if the precedent is cited, but for the wrong proposition? Arguably, a cryptic citation would not be viewed as sufficient to carry the plaintiff's burden of proving the necessary "legal facts."

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded.

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